VONG BAN HIN

v.

LAKSAMANA REALTY SDN. BHD.

HIGH COURT MALAYA, MELAKA
TUAN AUGUSTINE PAUL JC
[CIVIL APPEAL NO: 12-2-1996]
13 SEPTEMBER 1996

CIVIL PROCEDURE: *Appeal - Interlocutory order - Memorandum of appeal - Application for extension of time to file - Whether necessary to file - Subordinate Courts Rules 1980, O. 49 r. 6.*

CIVIL PROCEDURE: *Jurisdiction - Stare decisis - Court of Appeal refusing application for leave to appeal - Whether observations of Court of Appeal while refusing application for leave to appeal constitute binding precedent.*

CIVIL PROCEDURE: *Jurisdiction - Stare decisis - Earlier decision not followed by later decision - Whether first or second decision to be followed - Whether later decision prevails.*

The respondent had earlier filed an action against the appellant in the Court below *vide* Civil Suit No: 52-250-1994. When the matter came up for hearing, the appellant raised a preliminary objection to the effect that Counsel for respondent was not properly authorised by his clients to institute the proceedings. The preliminary objection was dismissed by the Sessions Court and the appellant appealed to the High Court under O. 49 r. 6 of the Subordinate Courts Rules 1980 ('the SCR'). Thereafter, the appellant filed an application in the High Court for extension of time to file its memorandum of appeal. The sole issue for determination by the High Court was whether the filing of a memorandum of appeal was required in the instant appeal.

Held:

[1] Order 49 r. 6 of the SCR was introduced by PU(A) 193 of 1993 with the object of allowing litigants to appeal against interlocutory orders made by the subordinate Courts, *viz.*, Magistrates and Sessions Court Judges. Prior to that, appeals may only be made against final decisions. In view of the large number of appeals that may arise, the Rules Committee found it unnecessary to require the notes of evidence, the grounds of judgment, and the memorandum of appeal to be filed.

[2] The observations of the Court of Appeal in *Yupaporn Seangarthit v. Neil Allan Campbell Webb* were not made in the course of hearing an appeal

but while dismissing an application for leave to appeal. Observations made in the course of refusing leave, as to any question of law or fact involved, amounts to no more than *obiter dicta*. Furthermore, refusal of leave to appeal against a decision of the High Court by the Court of Appeal gives the High Court judgment the same authority as any other unappealed judgment of the High Court.

[3] It therefore follows that the decision in *Syarikat Kayu Bersatu Sdn. Bhd. & Ors. v. UMW (Sarawak) Sdn. Bhd.* and the decision made in *Yupaporn Seangarthit v. Neil Allan Campbell Webb* at the High Court level do not enjoy any elevated status as a result of the observations made by the Court of Appeal. Accordingly, the decision in *Pembinaan Nadzri Sdn. Bhd. v. Koon Hoe & Co. Sdn. Bhd.* does not impinge on the doctrine of *stare decisis* in any way, and, must be taken to be the law as it a later decision.

[Filing of memorandum of appeal unnecessary; no orders made]

Cases referred to:

Syarikat Kayu Bersatu Sdn. Bhd. & Ors. v. UMW (Sarawak) Sdn. Bhd. [1995] 1 CLJ 113 ***(dist)***

Yupaporn Seangarthit v. Neil Allan Campbell Webb [1996] 1 CLJ 43 ***(refd)***

Pembinaan Nadzri Sdn. Bhd. v. Koon Hoe & Co. Sdn. Bhd. [1996] 2 CLJ 1038 ***(foll)***

Re Craig and Anor., ex p. Zietsch [1944] SR (NSW) 360 ***(foll)***

Gilbert-Ash (Northern) Ltd. v. Modern Engineering (Bristol) Ltd. [1973] 3 All ER 195 ***(foll)***

Legislation referred to:

Rules of the High Court 1980, O. 55 r. 2

Subordinate Courts Rules 1980, O. 26, O. 49 r. 6

For the appellant - Tan Lip Yip; M/s. Tan Lip Yip & Co.

For the respondent - Fatima Tahir Ali; M/s. S.F. Pang & Chandra

JUDGMENT

Augustine Paul JC:

Laksamana Realty Sdn. Bhd. ('the respondent'), a limited liability company, filed an action against Vong Ban Hin ('the appellant') in the Sessions Court at Melaka *vide* Civil Suit No: 52-250-1994. When the suit came up for hearing before the learned Sessions Court Judge on 10 January 1996 Counsel for the appellant raised a preliminary objection to the effect that Counsel for the respondents was not properly authorised by his clients to institute the proceedings. This objection was dismissed by the learned Sessions Judge and the appellant filed an appeal to the High Court under O. 49 r. 6 of the Subordinate Courts Rules 1980. On 4 September 1996 the appellant filed an

application in the High Court praying, *inter alia*, for an extension of time to file the memorandum of appeal in respect of the appeal that he had filed. The appellant felt that he was compelled to file a memorandum of appeal in the light of certain observations made by the Court of Appeal in a matter before it to which I will refer in a later part of the judgment. I heard the application on 13 September 1996. The issue for determination was whether a memorandum of appeal is required to be filed in an appeal of this nature. For ease of reference I shall refer to the Subordinate Courts Rules 1980 and the Rules of the High Court 1980 as 'the SCR' and 'the RHC' respectively.

Order 49 r. 6 of the SCR under which the appellant filed his appeal to the High Court reads as follows:

> 6.(1) Notwithstanding anything contained in this Order, an appeal shall lie to a Judge-in-Chambers from any decision made by the Court other than a decision made after trial.
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> (2) The appeal shall be brought by filing a notice of appeal in Form 140 within 14 days from the day on which the decision was pronounced, and serving a copy of the notice on every other party to the proceedings within the time limited for the filing of appeal to the Registrar of the High Court.
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> (3) Within three weeks after the filing of the notice of appeal, the appellant shall file the record of appeal in the High Court and the record shall contain copies of:
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> (a) the application for the decision;
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> (b) the statement of claim, and where defence has been filed, the statement of defence.
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> (c) all affidavits filed in support of or in opposition to the application; and
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> (d) the decision appealed from,
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> but shall not include the notes of evidence, the grounds of judgment or any memorandum appeal.

This Order was introduced by PU(A) 193 of 1993 with the object of allowing litigants to appeal against interlocutory orders made by Magistrates and Sessions Court Judges. Prior to this an appeal may lie only against a final decision. In view of the large number of appeals that may arise under the new provision thereby resulting in increased workload for the subordinate Court officers the Rules Committee, in its wisdom, found it unnecessary for the notes of evidence, grounds of judgment and the memorandum of appeal to be filed in such appeals. However, the proper interpretation to be accorded to this Order has become the subject matter of diverse judicial thinking as of late.

It came up for interpretation before Richard Malanjum J in *Syarikat Kayu Bersatu Sdn. Bhd. & 2 Ors. v. UMW (Sarawak) Sdn. Bhd.* [1995] 1 CLJ 113 where his Lordship in declaring that a memorandum of appeal must be filed in an appeal under that Order said at pp. 115-116:

> Having considered the relevant provisions in the SCR 1980 and RHC pertaining to the issue before this Court I am of the view that they should be construed, where an appellant intends to proceed under O. 49 r. 6 of the SCR 1980, in the manner as follows:
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> (i) Notice of appeal in Form 140 to be filed within 14 days from the day on which the decision was pronounced and to serve the notice on every other party to the proceeding "within the time limited for the filing of appeal to the Registrar of the High Court." After perusing the relevant provisions I am of the opinion that the period of serving on the other party or parties of the notice of appeal appears to be 14 days as well;
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> (ii) Within three weeks after filing of the notice of appeal, the appellant shall file the record of appeal in the High Court containing the relevant documents as stated in O. 49 r. 6(3) of the SCR 1980 but excluding notes of evidence, the grounds of judgment or any memorandum of appeal;
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> (iii) the Court appealed from on receiving the notice of appeal should comply with O. 49 r. 2 and the other relevant provisions so as to enable the appeal to be brought before the High Court. This means that the necessary notice under Form 141 should be issued;
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> (iv) the appellant must also comply with the relevant provisions under O. 55 of the RHC 1980, i.e. to file the necessary memorandum of appeal. On this point learned Counsel for the appellant highlighted the provision of O. 49 r. 6. But there is a confusion I think. In the first place a memorandum of appeal would not be taken as forming part of the record of appeal – (See *Siang Galau v. Ang Wak Hiong* [1994] 1 CLJ 82. So even though O. 49 r. 6 specifically excluded any memorandum of appeal, I do not think that the provision should be interpreted to mean that the other provision of O. 55 of RHC 1980 should be ignored; and
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> (v) that the hearing is to be before a Judge-in-Chambers.

The sequel to the *Syarikat Kayu Bersatu* decision is *Yupaporn Seangarthit v. Neil Allan Campbell Webb* [1996] 1 CLJ 43.

In that case the respondent sued the appellant in the Magistrates' Court for RM23,000 special damages, interest and costs. The claim was based on an alleged breach of contract. The appellant filed a defence and counterclaim. The respondent applied for and obtained summary judgment on 10 November 1993 pursuant to O. 26 of the SCR. On 29 November 1993 (i.e. within 14 days), the appellant filed and served her notice of appeal. On 15 December

1993, she filed the appeal record pursuant to O. 49 r. 6 of the SCR. The appeal record did not include the notes of evidence, grounds of judgment or any memorandum of appeal. On 27 December 1994, the Senior Assistant Registrar of the High Court sent a letter to the solicitors of both parties to say that the record had been received on 15 December 1993 and that the appeal had been registered as Rayuan Sivil No: 22-21-1993. The appellant's solicitors did not take any further action and the appeal was fixed for hearing on 7 December 1994. On 6 December 1994, the respondent's solicitors served a written notice that they would raise a preliminary objection to the appeal on the ground that the memorandum of appeal had not been served pursuant to O. 55 of the RHC. At the hearing, the appellant's Counsel submitted that the effect of O. 49 r. 6(3) of the SCR was to dispense with the need for a memorandum of appeal since the appeal was merely by way of rehearing of the application and there had been no trial since this was an interlocutory application. The learned trial Judge did not agree and dismissed the appeal with costs. In order to appeal against that decision the appellant applied to the Court of Appeal for leave to enable her to do so. Mahadev Shankar JCA in writing for the Court of Appeal observed at p. 708:

> The appellant's Counsel submitted that the effect of O. 49 r. 6(3) of the SCR was to dispense with the need for a memorandum of appeal, since the appeal was merely by way of a rehearing of Webb's application and there had been no trial since this was an interlocutory application.
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> The trial Judge did not agree and dismissed the appeal with costs. In order to mount an appeal against this decision, the appellant has come to us for leave.
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> Before us, appellants' Counsel made the same submission she made in the Court below. It did not find favour with us.
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> The issue is admirably covered in *Syarikat Kayu Bersatu Sdn. Bhd. & Ors. v. UMW (Sarawak) Sdn. Bhd.* [1995] 1 CLJ 113 by Richard Malanjum J. We entirely agree with what he has said.

The Court of Appeal further observed that the appellant ought to have applied for an extension of time to file the memorandum of appeal and decided that, in the circumstances, it was not a fit case to give leave to appeal. The observations made by the Court of Appeal in the *Yupaporn* case on the need to file a memorandum of appeal in an appeal under O. 49 r. 6 of the SCR has been regarded as having binding effect as made patent by the application before me.

Pembinaan Nadzri Sdn. Bhd. v. Koon Hoe & Co. Sdn. Bhd. [1996] 2 CLJ 1038 is another case where in an appeal under O. 49 r. 6 of the SCR the memorandum of appeal had not been filed. Learned Counsel for the respondent submitted before Abdul Kadir Musa JC (as he then was) that the failure to

file the memorandum of appeal was in breach of O. 55 r. 2 of the RHC based on the *Yupaporn* case. The respondent also relied on the *Syarikat Kayu Bersatu* case. In his reply, learned Counsel for the appellant contended that O. 49 r. 6 of the SCR is an independent provision governing appeals from decisions on interlocutory applications and was not affected by O. 55 r. 2 of the RHC. Abdul Kadir Musa JC (as he then was) referred to the *Yupaporn* decision and said at pp. 1044-1045:

> At this juncture, permit me to emphatically stress here that, since *Yupaporn's* case *(supra*) is the decision of the Court of Appeal, and the main issue decided thereto was an appeal arising from O. 26A SCR application, unless and until the said decision has been overruled by a higher Court or distinguished by a Court of co-ordinate jurisdiction, I am bound to follow that decision based on the principle of *stare decisis*. Entertaining that fact, I am of the most humble view and stand to be corrected by the higher Court, I should not blanketly accept the principle of *stare decisis* if it can be demonstrated that, Richard Malanjum J's decision can be distinguished, and/or shown not to have been adequately dealt with in relation to the effect(s) of the aforesaid two Orders. It must be so, because it is not the decision of the appellate Court that I am distinguishing, but a decision of another High Court sitting in Sarawak. It is with this in mind, that I will endeavour to distinguish the said *Syarikat Kayu Bersatu's* case with what I consider as to how those two Orders ought to be viewed, and consequently the necessary ruling(s) as to Chew's objection.

Abdul Kadir Musa JC (as he then was) then said that both the SCR and RHC are subsidiary legislation having statutory force and went on to examine the scope of O. 49 r. 6 of the SCR in its proper perspective and said at pp. 1050-1051:

> If O. 55 r. 2(1) RHC is to be examined more closely, it can be seen clearly that, the need to file the memo as stated thereto, only applies to appeals arising from matters in relation to O. 49 rr. 2(4) and 3(2) of the SCR where Form 141 has to be issued by the Court where the notice of appeal in Form 140 was filed. In practise, since the amendment to O. 49 SCR was effected, the Court concerned will inform the appellant, either on its own or when asked for, that, neither the notes of evidence nor the grounds of judgment will be issued to the appellant; that is to say, Form 141 will not be issued by such Court since 1 August 1993. Without being supplied with such materials, I cannot visualise how the memo can be prepared, save aside to file the same as required by O. 55 r. 2(1) of the RHC. It must have been tailored to that situation when SCR was amended by inserting r. 6 to O. 49, the phrase "notwithstanding anything contained in this Order" was included in sub-rule (1) of the said r. 6. By so doing, it provides a special procedure in respect of any appeal against any "summary" or "interlocutory" decision of a subordinate Court ... .
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> From the above discussion, if one were to apply the cardinal principle of interpretation found in the maxim of *'generalibus specialia derogant'*, it would

be obvious that, the legislative intention in r. 6 of O. 49 must necessarily, after 1 August 1993, exclude the operation of either r. 2(4) or 3(2) of the same rule. The said rule of construction was clearly stated by Gopal Sri Ram JCA in the case of *Luggage Distributors (M) Sdn. Bhd. v. Tan Har Teng @ Tan Tien Chi & Anor.* [1995] 3 CLJ 520; [1995] 2 AMR 969 at p. 1013, the following:

> ... the rule of construction expressed in the maxim *'generalibus specilia derogant'*, that is, where there are two provisions of written law, one general and the other specific, then, whether or not these two provisions are found in the same or different statutes, the special or specific provision excludes the operation of the general provision.

Thus, in the circumstances, it is my most humble conclusion that, the question of "abrogating the requirement of O. 55 r. 2 of the RHC" by not filing the memo in relation to O. 49 r. 6(3) of the SCR, does not arise at all. On the other hand, if that requirement is to be construed as mandatory, then it would amount to nullifying the very legislative intention of introducing r. 6 to O. 49 of SCR, and that will certainly be against the established principle of the rules of construction of any particular provision of a statute or a subsidiary legislation as discussed earlier.

In conclusion and on the premises above, it is my most humble and considered conclusion, and with utmost respect to Richard Malanjum J, that, there is certainly no need to file the memo in respect of any appeal arising from an O. 26A SCR application after 1 August 1993. Since my disagreement with his Lordship is on his analysis of substantive issue which was fully endorsed by the Court of Appeal in the said *Yupaporn's* case *(supra*) it is therefore again my most humble and considered opinion that, the question of whether or not I am bound by the principle of *stare decisis* does not arise. On that basis and with the aforesaid conclusion in mind, I therefore disallowed Chew's objection and fixed the date for the hearing of the substantive appeal accordingly.

The erudite ratiocination of the issues involved by Abdul Kadir Musa JC (as he then was) followed by his logical conclusion that in an appeal under O. 49 r. 6 of the SCR the need to file a memorandum of appeal does not arise compels me to concur with his Lordship wholeheartedly. However, it may not be out of place for me to refer, with respect, to the doctrine of *stare decisis* which appeared to have caused some uneasiness. It must be realised that the observations made by the Court of Appeal in *Yupaporn* were not made in the course of hearing an appeal but while dismissing an application for leave to appeal. In *Re Craic and Anor., ex p. Zietsch* [1944] SR (NSW) 360 Jordon CJ said that where the High Court made no order except to refuse leave to appeal in an application for leave to appeal it is open to question whether, in strictness, any observation made by the Court as to any question of law or fact involved amounts to more than *dicta*. Furthermore, refusal of leave to appeal against a decision of the High Court by the Court of Appeal, as in the *Yupaporn* case, gives the High Court judgment the same authority

as any other unappealed judgment of the High Court. Support for this proposition flows from the House of Lords where Lord Diplock in delivering his speech in *Gilbert-Ash (Northern) Ltd. v. Modern Engineering (Bristol) Ltd.* [1973] 3 All ER 195 said at p. 214:

> Refusal of leave to appeal does not imply approval by this House of a judgment sought to be appealed against. That judgment carries the same authority as any other unappealed judgment of the Court of Appeal - neither more nor less.

It therefore follows that the *Syarikat Kayu Bersatu* decision and the decision made in the *Yupaporn* case at the High Court level do not enjoy any elevated status as a result of the observations made by the Court of Appeal. Accordingly, I am of the opinion that the views expressed by Abdul Kadir Musa JC (as he then was) in the *Pembinaan Nadzri Sdn. Bhd.* decision that in an appeal under O. 49 r. 6 of the SCR there is no need to file a memorandum of appeal do not impinge upon the doctrine of *stare decisis* in any way. As *Pembinaan Nadzri Sdn. Bhd.* has declined to follow S*yarikat Kayu Bersatu* which is a decision of a Court of co-ordinate jurisdiction, the former must be taken to be the law with which I am in full agreement.

In the upshot, as there is no necessity to file a memorandum of appeal in an appeal under O. 49 r. 6 of the SCR, the need for the appellant to obtain leave to file the memorandum of appeal out of time does not arise. In the premises I made no order on the application.

Reported by Aslam Zainuddin